COURT OF APPEALS
DECISION
DATED AND FILED

November 15, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP1417-FT **Cir. Ct. No. 2005CV97**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

GREEN LAKE CARPENTRY AND CONTRACTING COMPANY, INC.,

PLAINTIFF-RESPONDENT,

V.

JOE GARCIA, D/B/A IRON WOOD CREATIONS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Green Lake County: WILLIAM M. MCMONIGAL, Judge. *Affirmed*.

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Joe Garcia appeals from the summary judgment entered against him. He argues on appeal that the respondent did not present sufficient facts in its affidavit to support its claim for the summary judgment

awarded against him. Because the appellant did not raise this argument before the circuit court, we affirm.

¶2 The respondent contractor, Green Lake Carpentry and Contracting Co., sued Garcia, a subcontractor, for breach of contract alleging that he had built a railing that was of poor quality, did not meet building codes, and was unacceptable to the homeowner. Garcia wrote a letter in response. Green Lake Carpentry moved for a default judgment, which was denied by the court. Green Lake Carpentry then moved for summary judgment, arguing that Garcia had not directly responded to any of its allegations or denied any of the facts in the complaint. The court held a hearing on the motion and found that Garcia had not filed a timely response to the motion and granted summary judgment to Green Lake Carpentry.

¶3 The order signed by the court included as a "Conclusion of Law" the statement that the plaintiff was entitled to summary judgment under WIS. STAT. § 806.02 (2003-04),[1] the default judgment statute, because the appellant had not filed a sufficient answer. From the reading of the transcript, however, it is clear that the court was not finding a default. At a previous hearing on the respondent's default motion, the court found that the appellant had filed an answer, albeit an inadequate one, and then invited a summary judgment motion. At the summary judgment hearing, the court found that nothing had been filed in opposition to the summary judgment motion. The court stated:

> Certainly had there been something added to this that would have given more detail about the facts in dispute,

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

> such as an affidavit, timely filed, the court would be able to perform the function that the court is obligated to perform. And that is to analyze the pleadings and any affidavits or counter affidavits and certainly viewed in a manner that avoids the drastic result of a summary judgment motion. But I have nothing here to work with, for whatever reason. So the court is going to grant the motion for summary judgment.

¶4 When there is a conflict between an unambiguous oral pronouncement and an equally unambiguous written judgment, the oral pronouncement controls. ***State v. Lipke***, 186 Wis. 2d 358, 364, 521 N.W.2d 444 (Ct. App. 1994). In this case, the oral pronouncement was granting summary judgment and not a default judgment. Consequently, we will ignore the statement in the order that this is a default judgment and treat it as an appeal from a grant of summary judgment.

¶5 On appeal, Garcia argues that the affidavit Green Lake Carpentry submitted in support of the motion for summary judgment was insufficient to support the judgment. Garcia raises this argument for the first time in this appeal. We have often said that we will not consider an issue raised for the first time on appeal. *See* ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983). While this is a rule of judicial administration from which we may depart, ***id.***, we see no reason to do so here.

¶6 Under the circumstances of this case, we conclude that it would be fundamentally unfair to take up this issue, and perhaps reverse, when the trial court has not had an opportunity to rule on it. The reason the trial court granted summary judgment to the respondent was because the appellant had not timely responded to the motion. The trial court found that the appellant had plenty of time to respond to the summary judgment motion, and had not done so. Nothing prevented the appellant from challenging the sufficiency of the respondent's

affidavit in the trial court. Since the appellant had the opportunity to raise this issue in the trial court but failed to do so, we will not consider it in this appeal. For these reasons, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.